



**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**[FHWA Docket No. FHWA-2017-0006]**

**Fixing America's Surface Transportation (FAST) Act; Equal Access for Over-the-Road Buses Guidance**

**AGENCY:** Federal Highway Administration (FHWA), Department of Transportation (DOT).

**ACTION:** Notice.

**SUMMARY:** This Notice announces and outlines the final guidance for requirements contained in Section 1411(a) and (b) of the FAST Act regarding the treatment of over-the-road buses (OTRBs).

**DATES:** This guidance is effective [Insert Date of Publication in the Federal Register].

**ELECTRONIC ACCESS:** This document, the request for comments, and the comments received may be viewed online through the Federal eRulemaking portal at:

<http://www.regulations.gov>. Electronic submission and retrieval help and guidelines are available on the Web site. It is available 24 hours each day, 365 days each year. Please follow the instructions. An electronic copy of this document may also be downloaded from the Office of the Federal Register's Web site at: <http://www.archives.gov/federalregister> and the Government Publishing Office's Web site at: <http://www.gpo.gov/fdsys>.

**FOR FURTHER INFORMATION CONTACT:** Ms. Cynthia Essenmacher, Federal Tolling Program Manager, Center for Innovative Finance Support, Office of Innovative Program Delivery, Federal Highway Administration, 315 W. Allegan St., Ste. 201, Lansing, MI 48913, (517) 702-1856. For legal questions: Mr. Steven Rochlis, Office of the Chief Counsel, Federal Highway Administration, 1200 New Jersey Avenue SE, Washington, DC 20590, (202) 366-

1395. Office hours are from 8:00 a.m. to 4:30 p.m. E.T., Monday through Friday, except for Federal holidays.

## **SUPPLEMENTARY INFORMATION:**

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### **A. Background**

The FHWA published a Federal Register Notice on April 28, 2017, at 82 FR 19784, seeking public comment for the FAST Act OTRB provisions related to high-occupancy vehicle (HOV) facilities and toll highways. In preparing this guidance to assist in the implementation of Section 1411 of the FAST Act, FHWA considered all public comments submitted to the Federal Register Notice.

Section 1411(a) and (b) of the FAST Act contained new requirements regarding the treatment of OTRBs that access toll highways and HOV facilities. Specifically, the FAST Act amended 23 U.S.C. 129 and 23 U.S.C. 166 to address equal access to toll or HOV facilities for OTRBs. The FAST Act amendments defined certain key terms but did not define other terms. The FHWA considered how to define the terms that were not defined under Section 1411 (Section C) as well as enumerating the toll facilities subject to the OTRB requirements (Section D), as the OTRB amendment related to toll facilities that received or will receive Federal participation under 23 U.S.C. 129. In addition, FHWA believes that Congress intended that the OTRB equal access provisions be effective beginning on December 4, 2015, the enactment date of the FAST Act, in contrast to the FAST Act effective date of October 1, 2015, as noted further

in Sections B and F. Application of the OTRB requirements retroactive to the FAST Act enactment date raised potential constitutional implications associated with the application prior to the enactment date, particularly for those toll facilities operated by private taxpayers under agreement with a public authority that may have assessed different toll rates to OTRBs during this period between October 1, 2015, and December 4, 2015, without notice of the change in law.

For HOV facilities, 23 U.S.C. 166 (b)(3) was amended by the FAST Act, adding subparagraph (C) to grant HOV authorities an exception to allow public transportation vehicles (which FHWA interprets to include all public transportation vehicles, including public transportation buses) that do not meet the minimum occupancy requirements to use HOV lanes, but only if the HOV authority also gives equal access to OTRBs that serve the public. Under this exception, HOV authorities may allow all public transportation vehicles to use HOV lanes, whether they meet the minimum occupancy requirements or not, if they provide equal access to OTRBs serving the public, under the same rates, terms, and conditions as all other public transportation vehicles.

Additionally, 23 U.S.C. 166(b)(4)(C) was amended by the FAST Act, adding subparagraph (iii), to grant HOV authorities the alternative to toll vehicles not meeting the minimum occupancy requirements in HOV lanes. In that case, HOV authorities are required to provide access to OTRBs that serve the public under the same rates, terms, and conditions as public transportation buses (which FHWA interprets to exclude other types of public transportation vehicles, which may be treated differently by the HOV authority). Similarly, on toll facilities subject to 23 U.S.C. 129, the FAST Act amended 23 U.S.C. 129(a) by adding paragraph (9) to also require that OTRBs that serve the public be provided access to the toll facility under the same rates, terms, and conditions as public transportation buses.

## **B. Summary Discussion of Comments**

Comments were submitted to the Federal Register Notice published in April 2017.

Comments submitted to the docket can be viewed at:

<https://www.regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&dct=PS&D=FHWA-2017-0006>.

Commenters included the public transit constituency, both public and private operators, as well as individuals. The respondents directed their comments within three categories. The three categories are general comments, compliance, and information availability. The following summarizes the comments and FHWA's response.

### *General Comments*

- Two commenters recommended that FHWA use the Federal Register Notice comments to update and expand existing tolling program guidance published on September 24, 2012.
- One commenter inquired about toll transponders recognizing exemptions on different facilities.

FHWA Response: The purpose of the Notice was to solicit comments on the new OTRB requirements that FHWA would incorporate into implementation of OTRB requirements. Comments concerning expansion of the guidance to address tolling guidance and transponder use is beyond the scope of the Federal Register Notice.

- One commenter would like to see FHWA explain why certain facilities are not included in the Section 129 covered facilities list.

FHWA Response: Section 1411 of the FAST Act is applicable to Federal-aid toll facilities where construction of the facility occurred under 23 U.S.C. 129(a) authority. This

would include a facility that either uses Federal-aid funds on an existing toll facility in accordance with section 129(a), or imposes tolls on a facility constructed with Federal-aid funds pursuant to section 129(a). Facilities under other Federal tolling authority are not subject to OTRB requirements.

### *Compliance Comments*

- Three commenters requested that FHWA use the existing annual audit process required under 23 U.S.C. 129(a)(3)(B) to determine whether tolling facilities are complying with the OTRB equal access requirements.

FHWA Response: The purpose of the annual audit process is to ensure facilities are complying with the limits on the use of revenues under 23 U.S.C. 129, it does not address operational aspects of the toll facility.

- Three commenters requested FHWA clearly state that bus companies have a legal right to seek refunds from toll operators to correct unequal treatment.

FHWA Response: If an OTRB entity believes equal access was not provided by a covered facility any time after December 4, 2015, that entity should contact the owner/operator of the facility to request a refund. The FHWA does not own, operate, or control the HOV and toll facilities subject to the OTRB requirements.

- Three commenters recommended that the FHWA guidance should make it clear to Division Administrators and to the public authority recipients of Federal funding that the OTRB requirements are already effective and have been in effect since October 1, 2015, and do not depend on any further guidance or other action by FHWA to be enforceable.

FHWA Response: The FHWA acknowledges that the changes in law are effective beginning on the enactment date of the FAST Act on December 4, 2015, and continue in effect,

but believes that the issuance of this guidance clarifies the OTRB provisions and will assist affected parties that are subject to the OTRB requirements.

#### *Information Availability Comments*

- Three commenters suggested that FHWA require that all facility agencies create and publish their respective rates, terms, and conditions for use of their facilities.

FHWA Response: The FHWA does not own, operate, and control the toll facilities and does not have jurisdiction to impose this suggested requirement.

- One commenter requested FHWA amend the Section 129 facilities list to include the names of the tolling authorities responsible for the operation of each facility.

FHWA Response: The FHWA is publishing an inventory of facilities that received Federal-aid funding under 23 U.S.C. 129 and are subject to the OTRB provisions. See section D, below.

All comments were taken into consideration when developing this final Federal Register Notice. The following sections of this Notice provide the final guidance for implementation of the OTRB requirements. This guidance is also available at FHWA's Web site: [INSERT LINK].

#### **C. Applicable Definitions for Implementing Section 1411 of the FAST Act**

For the purposes of implementing FAST Act Section 1411 amendments to 23 U.S.C. 129 and 166, FHWA will use the following definitions previously stated in the Federal Register Notice at 82 FR 19784. The definitions are:

“*Over-the-road bus*” is defined as a bus characterized by an elevated passenger deck located over a baggage compartment.

*“Public Transportation Bus”* is a category of public transportation vehicle (as defined in 23 U.S.C. 166(f)(6)), consisting of a motor vehicle with motive power, except a trailer, designed for carrying more than 10 persons.

*“Public Transportation Vehicle ”* means a vehicle that (A) provides designated public transportation (as defined in section 221 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12141) or provides public school transportation (to and from public or private primary, secondary, or tertiary schools); and (B)(i) is owned or operated by a public entity; (ii) is operated under a contract with a public entity; or (iii) is operated pursuant to a license by the Secretary or a State agency to provide motorbus or school vehicle transportation services to the public.

*“Serve/Serving the Public”* means provision of service to the general public, including general or special service (including charter service) on a regular and continuing basis.

*“Toll Facility”* means a toll highway, bridge, or tunnel or approach to the highway, bridge, or tunnel constructed under 23 U.S.C. 129(a).

## **D. Covered Facilities Subject to OTRB Equal Access**

### ***Section 129 Facilities***

Section 1411 of the FAST Act is applicable to Federal-aid toll facilities where construction of the facility occurred under 23 U.S.C. 129(a) authority. Facilities “constructed under” Section 129 includes both facilities subject to Section 129 tolling agreements executed prior to the Moving Ahead for Progress in the 21st Century Act (MAP-21) (P.L. 112-141), which eliminated the requirement for a Section 129 toll agreement, and facilities that have become (or will become) subject to Section 129 post-MAP-21 (which may, or may not, have a tolling Memorandum of Understanding with FHWA). This would include a facility that either uses

Federal-aid funds on an existing toll facility in accordance with Section 129(a), or imposes tolls on a facility constructed with Federal-aid funds pursuant to Section 129(a).

Federal-aid toll facilities that were constructed under other Federal tolling authorities and not subject to Section 1411 of the FAST Act are included in the Section 129 Covered Facilities list for reference. Other Federal tolling authorities include the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. 100-17) and the Intermodal Surface Transportation Efficiency Act of 1991 (Pub. L. 102-240).

The OTRB Section 129 Covered Facilities list can be found at the FHWA's Center for Innovative Finance Support's Web site at:

[https://www.fhwa.dot.gov/ipd/revenue/road\\_pricing/tolling\\_pricing/active\\_agreements.aspx](https://www.fhwa.dot.gov/ipd/revenue/road_pricing/tolling_pricing/active_agreements.aspx).

The FHWA will annually review and update this list for additions and completeness.

### ***Section 166 Facilities***

Under 23 U.S.C. 166(f)(2), the term "HOV facility" means a high occupancy vehicle facility. There are no exclusions or exceptions under this definition based on Federal-aid participation in the construction or operation of the HOV facility. Therefore, FHWA believes amendments made by Section 1411 of the FAST Act are applicable to all Section 166 HOV facilities, regardless of Federal-aid participation in the project.

### **E. Compliance**

The requirements of 23 U.S.C. 129(a) and 23 U.S.C. 301 apply to the use of Federal-aid funds for construction (as defined at 23 U.S.C. 101(a)(4)) on tolled highways, bridges, and tunnels, including the use of emergency relief funds for repairs to toll facilities (see 23 CFR 668.109(b)(9)). When Federal funds are used for allowable purposes under 23 U.S.C. 129,



grantees are required to follow applicable statute, regulations, and policies. This includes equal access and treatment for OTRBs.

#### **F. Effective Date**

If an OTRB entity believes equal access was not provided by a covered facility any time after December 4, 2015, that entity should contact the owner/operator of the facility to address this concern.

Issued on: February 15, 2018.

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Acting Administrator,  
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